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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1586

MARATHON OIL COMPANY, a corporation; and ROBERT LEHMAN, et al, d/b/a LEHMAN BROTHERS, *Petitioners*

v.

GEORGE H. BRUCE; ROBERT MARTIN; and HON. LUTHER BOHANON, United States District Judge, *Respondents*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY MEMORANDUM OF PETITIONERS

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This short reply will be confined to the new question posed in respondents' opposition brief at p. 2, and to answering the argument that respondents should have been allowed to try Count II to a jury before trying Count I to the Court, or should at least have been granted leave

to file an amended complaint withdrawing Count I and repleading Count II. Both of these contentions were decided against respondents by the District Court and the Court of Appeals. They presuppose a decision of this Court that Count I is equitable and triable by the Court without a jury. To that extent they are a confession that the Court of Appeals erred in holding that Count I states a claim at law and not in equity.

I.

The single question raised in our petition for certiorari is whether the Court of Appeals correctly held that Count I should also be tried to a jury where the only relief sought in Count I is a decree determining whether respondents have "equitable rights" to participate in a Japanese contract between other parties, and if so, the "precise nature and extent" of their equitable rights, followed by an accounting. No question is here raised nor was a question presented in the Court of Appeals as to the correctness of the holding of the District Court that Count II is triable to a jury. Therefore, the issue is not whether plaintiffs below were deprived of their constitutional right to a jury trial, but whether that right also includes the right to try an equitable claim to a jury.

The writ of mandamus was granted by the Court of Appeals only "insofar as it relates to petitioners' [Bruce and Martin] right to trial by jury of Count I." As to all other issues raised in the mandamus petition, including the new question posed in the opposing brief of respondents herein, the Court of Appeals said: "The balance of the relief prayed for by petitioners, however, is denied and we perceive of no good purpose in detailing our reasons therefor, inasmuch as the central issue is peti-

tioners' right to trial by jury of Count I." (Opinion, Appdx. A-9.) Consequently if, as the District Court held, and as we contend, Count I is not triable to a jury, then the Court of Appeals has necessarily held that the District Court did not err in ordering Count I tried first, nor did it err in denying plaintiffs (respondents herein) leave to amend a second time even though they proposed to withdraw Count I and replead their claim asserted in Count II.

II.

Respondents' argument neither supports the decree and opinion of the Court of Appeals nor the orders of the District Court. Consequently, it does not come within the rule announced in *Dandridge v. Williams,* 397 U.S. 471, 475, that the prevailing party may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it. Obviously the argument which was rejected by the Court of Appeals does not support its opinion and decree that Count I is triable to a jury. On the contrary, the contention is made on the theory that should Count I be an equitable claim, then the Court of Appeals should have granted respondents some of the additional relief prayed for in their mandamus petition. That contention though cannot be made here because no cross-petition has been filed. *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375.

III.

However, even if the contention could be considered by this Court, it is not grounds for denying the petition

for certiorari. The District Court, in announcing that Count I would be tried first, was simply following the order in which the plaintiffs had pleaded their claims. They prayed in Count II (R-3, Ex. "B", pp. 18-19) as follows: "Wherefore, in the alternative, in the event the Court does not grant the *equitable relief* prayed for upon Count I herein, plaintiffs pray for judgment * * *." Having sought a trial first of their equitable claim, they cannot complain of the ruling of the District Court that their equitable claim will be tried first.

Nor can they complain of the refusal of the District Court to grant them leave to again amend their amended complaint, even though they did propose to withdraw Count I, and replead their action at law. The District Court has wide discretion under Rule 15, F.R.Civ.P., in granting or denying leave to amend a complaint which has already been amended once. *Grombach v. Oerlikon Tool and Arms Corp. of America,* 276 F.2d 155, 165 (C.A. 4, 1960); *McHenry v. Ford Motor Co.,* 269 F.2d 18, 24 (C.A. 6, 1959); 3 *Moore's Federal Practice* (2nd Ed.), ¶ 15.08[4], p. 895. Whether the Court has abused its discretion cannot be reviewed in a mandamus proceeding filed under the All Writs Act, 28 U.S.C. 1651(a). *Platt v. Minnesota Mining and Mfg. Co.,* 376 U.S. 240, 245; *Ex parte Bradstreet,* 7 Peters (32 U.S.) 634, 647.

IV.

Respondents concede in their brief, p. 9, ¶ I, pp. 11-12, that they seek equitable relief in Count I, but they characterize it as "some equitable relief," leaving the inference that other relief is sought, but this is not correct. All of the relief which they seek in Count I is historically

and traditionally equitable in nature, and their claim does not cease to sound in equity simply because it arises out of an alleged breach of a fiduciary relation. A breach of fiduciary relation might be grounds for a tort action, but Count I is not that kind of an action. The nature of Count I must be judged from the remedy sought and not from allegations upon which the remedy is based. Were this not true, then there would be no equitable actions because the wrong could be remedied by an action at law for damages.

Equitable claims generally involve issues of fact, but this does not create a legal claim entitling a party to a jury trial. *Shubin v. United States District Court,* 313 F.2d 250, 251 (C.A. 9, 1963), cert. den. 373 U.S. 936.

The prerequisite to an action in equity is the absence of an adequate remedy at law. *Beacon Theatres v. Westover,* 359 U.S. 500, 510; *Dairy Queen v. Wood,* 369 U.S. 469, 478. Respondents pleaded Count I on the basis of no adequate remedy at law, and asked that that count be first tried. They pleaded Count II only in the event they could not prevail on Count I, and impleaded additional defendants against whom no relief is sought in Count I. Under these conditions the District Judge, in the exercise of his discretion, correctly proceeded with the trial of Count I, following the order in which the two counts were pleaded, until his action was improperly stayed. That he had this discretion was settled in *Beacon Theatres, supra,* at p. 510, and whether he correctly exercised his discretion is not a matter properly brought to this Court.

V.

The Brief in Opposition shows no reason why the petition for certiorari should not be granted. Therefore, we respectfully submit that the Court should grant this petition for certiorari and summarily reverse, without the necessity for additional briefs or for oral argument, the judgment of the Court of Appeals, and order it to dismiss the petition for a writ of mandamus.

Respectfully submitted,

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